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No. 85-1672

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM D. MERCHANT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. The court of appeals held that the February 27 hearing was invalid because respondent was not given personal notice that it was scheduled to take place.[1] As we explained

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[1]There is no doubt that the court of appeals ruled that the February 27 hearing was invalid for this reason. See Pet. App. 6a ("[t]he [state municipal] court's attempt to modify the stay was ineffective because [respondent] was not given adequate notice"); *id.* at 10a ("[t]he absence of notice to [respondent] renders the February 27 order a nullity"); *id.* at 10a n.5 ("[w]e need not decide whether [respondent's] presence was required at the February 27 hearing, because we decide that the failure to give him notice of that hearing invalidated the order. We allude to the constitutional right of a defendant to be present at proceedings against him as support for our conclusion that the defendant, not merely his counsel, must be given notice."); *id.* at 14a ("[w]e conclude that [respondent] was not on probation on March 3 when the state officers came to search his house because he was not given notice of the February 27 hearing at which his probation ostensibly was 'reinstated' "). Respondent concedes as much. See Br. in Opp. 6.

in our petition (at 11-14), that decision is inconsistent with the relevant provisions of the Federal Rules of Criminal and Civil Procedure, with the decisions of this Court and other courts of appeals that notice to a party's attorney of a scheduled court proceeding is deemed to be notice to the party himself; and with the practice of representative litigation as it is routinely conducted in the federal and state courts. We also pointed out (Pet. 17) that the court of appeals' ruling does not materially advance the purposes for which the Due Process Clause requires notice. Our submission is that notice to the defendant's attorney of the pendency of any proceeding that may occur during the course of a criminal prosecution satisfies any due process requirement that the defendant himself be notified of the proceeding. Respondent has offered no reason why our submission is not fully consistent with this Court's decisions, why the court of appeals' contrary ruling is necessary to satisfy due process requirements, or why the court of appeals' ruling on the question of notice does not warrant this Court's review.

Relying primarily upon *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), respondent maintains (Br. in Opp. 16-17) that he was entitled to be personally notified of the February 27 hearing because the order entered by the trial judge at that proceeding affected his Fourth Amendment rights.[2] *Gagnon*, however, does not support the court of appeals' ruling. *Gagnon* held that a probationer was entitled to notice of both a preliminary and a final probation revocation hearing (411 U.S. at 782), but it did not suggest that notice to a probationer's attorney of those proceedings would be insufficient to satisfy due process requirements. Indeed, the

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[2]Respondent's argument (Br. in Opp. 15) that the court's order restricted his constitutional right to possess the 80 firearms that were found scattered throughout his house is frivolous. See *Lewis* v. *United States*, 445 U.S. 55, 65-66 n.8 (1980); *United States* v. *Miller*, 307 U.S. 174 (1939).

primary issue in *Gagnon* was whether due process required that an attorney be appointed for an indigent probationer at a probation revocation hearing (*id.* at 783-791). One of the functions that an attorney serves is to inform his client of any upcoming proceedings. For that reason, notice to a party's attorney of any such proceeding is properly deemed to be notice to the party, as this Court held in *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962).

Otherwise, respondent makes little effort to defend the court of appeals' ruling on its own terms. Instead, he devotes the bulk of his response to the defense of claims that the court of appeals did not address: namely, that he did not consent to the imposition of the consent-to-search clause in the original probation order (Br. in Opp. 8-11); that his probation could not be revoked for possessing firearms since he lacked notice that this condition of his probation was in effect (*id.* at 11-12); and that the hearing was invalid because he was not present (*id.* at 12-16). None of petitioner's arguments, however, supports the court of appeals' ruling that the defendant must be personally notified of every proceeding in a criminal case, which was the sole ground on which the court of appeals found the probation order invalid.

2. With regard to the second question presented in the petition, respondent first argues (Br. in Opp. 18-19) that the "reasonable mistake" exception to the exclusionary rule, which was adopted in *United States* v. *Leon*, No. 82-1771 (July 5, 1984),does not apply to a search carried out pursuant to a consent-to-search clause in a judgment of probation. *Leon* does not apply in this setting, he argues, because there is no policy favoring reliance on such provisions similar to the policy favoring resort to the warrant process. That claim, however, is inconsistent with the well-settled views of the California courts, which have long found that a consent-to-search clause is a reasonable

condition of probation and is consistent with the legitimate interests of the state probation process and the Fourth Amendment (see Pet. 19 & n.13).[3] Because provisions of this type are lawful as a general matter under state law, there is no reason not to apply *Leon* to respondent's case.

Nor does that result unduly delegate authority to a law enforcement officer to determine whether to carry out a particular search, as respondent contends (Br. in Opp. 19-20). Under California law, there must be reasonable grounds to conduct a probation search, and the search itself must be performed in a reasonable manner (Pet. 19 n.13). Respondent's argument, at most, simply supports the proposition that courts should carefully scrutinize a search carried out pursuant to the authority granted the police by a consent-to-search provision. That proposition, however, does not require that an objectively reasonable search should automatically and invariably require suppression because of a technical mistake by the court in the process by which such a condition of probation is imposed.

Respondent also argues that the officers' reliance on the state court's February 27 order was not objectively reasonable, but his contentions on that issue are not persuasive. For instance, he relies (Br. in Opp. 20-22) on the court of appeals' conclusion that the search of his residence was not related to his probation since he had not yet been assigned a probation officer. As we have explained (Pet. 24 & n.16), however, the decision to search respondent's residence was

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[3]Indeed, the California Supreme Court recently held that the imposition of a consent-to-search clause on a parolee was a reasonable condition of parole. See *People* v. *Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986). In that case, the court approvingly cited its earlier decision in *People* v. *Mason*, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), cert. denied, 405 U.S. 1016 (1972), which held that a consent-to-search clause was a reasonable and lawful condition of probation (see 714 P.2d at 1267, 224 Cal. Rptr. at 126).

prompted by the reports of gunfire on his property, ~~which~~ and was directly related to the reason he was forbidden to possess firearms while he was on probation.[4]

Respondent also argues (Br. in Opp. 21) that, because the reports of gunfire came at a time when he did not believe that he was forbidden to possess firearms, there was no reason for the prosecutor to conclude that he would not rid himself of them once he learned that this condition of his probation was in effect. But the question is not whether *respondent* reasonably believed that he was *not* on probation, but whether the *prosecutor* reasonably believed that he *was*. And the best proof that her belief was reasonable is the fact that both the state municipal court and the district court held (see Pet. 7-8 n.7; Pet. App. 17a) that respondent was in fact on probation at the time of the search (see *Leon*, slip op. 27). For the same reason, respondent errs in claiming (Br. in Opp. 23-24) that the officers acted unreasonably because respondent and his lawyer told the prosecutor once the search had begun that respondent was unaware of the court's February 27 order. The reasonable course for the officers and the prosecutor was to rely on the state court's facially-valid February 27 order, just as it was reasonable for the officers in *Massachusetts* v. *Sheppard*, No. 82-963 (July 5, 1984), to rely on the search warrant at issue in that case. Neither respondent's protests nor those of his attorney made that reliance unreasonable.

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[4]Respondent suggests (Br. in Opp. 22 n.22) that the search was actually a subterfuge to discover narcotics. The record does not support that assertion. The state prosecutor explained at the suppression hearing that she had received a complaint from one of respondent's neighbors that marijuana plants were growing on the boundary between that neighbor's property and respondent's. That complaint, however, turned out to be unfounded (5/21/81 Tr. 97-98, 102-106, 118-120), and there is no evidence that the local prosecutor thereafter sought to search respondent's house because she believed that he possessed narcotics.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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